BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: RUSSELL M., Claimant, vs HARBOR REGIONAL CENTER, Service Agency.	OAH No. L2006030159

DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 4, 2006, at Torrance, California.

Donna Baker and Rosa Hernandez (Parents) represented Claimant Russell M.

Dolores Burlison, Manager of Rights Assistance, represented Harbor Regional Center (Service Agency).

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge issues the following Decision.

ISSUE

Should Claimant's Alternative Residential Model (ARM) rating be changed from Service Level 4I to Service Level 2?

COMBINED FINDINGS OF FACT AND LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) is a comprehensive statutory scheme designed to provide supports and services for persons with developmental disabilities.[1] The Act has a two-fold purpose: (1) to prevent or minimize the

[1] The Lanterman Act is codified at Welfare and Institutions Code section 4500 et seq.

institutionalization of developmentally disabled persons and their dislocation from family and community; and (2) to enable developmentally disabled persons to approximate the pattern of living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4509, 4685, 4750 & 4751; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) The Department of Developmental Services (DDS) is the state agency required to implement the Lanterman Act. It carries out that responsibility by delivering its services through the various regional centers located statewide.

> [T]he Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, "has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons" (§4416), while "regional centers," operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with "access to the facilities and services best suited to them throughout their lifetime" (§4620). (*Association of Retarded Persons, etc. at p. 389.)*

2. The Adoption Assistance Program (AAP) is a program designed to encourage adoption of children who might otherwise be likely to remain in long-term foster care. The AAP is administered by the Department of Social Services (DSS). DDS bears no responsibility for administering that program.

3. Pursuant to Welfare and Institutions Code section 16118, subdivision (c), either DSS or the county responsible for the person participating in the program determines the amount of AAP benefits payable to the participant's adopting family. To that end, DSS adopted California Code of Regulations, title 22, section 35333, which states in pertinent part:

> The AAP benefit is a negotiated amount based upon the needs of the child and the circumstances of the adoptive family. The responsible public agency shall negotiate the amount of the AAP benefit and make the final determination of the amount according to the requirements of this section.

Subdivision (c)(1)(C) of the same regulation addresses the maximum AAP rate for children who are also clients of a regional center, as follows:

> If the child is a client of a California Regional Center (CRC) for the Developmentally Disabled, the maximum rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services. . . .

4. Residential facilities in which regional center consumers may be placed are rated by a service level,[2] as approved by a local regional center. The service levels range from 1 to 4, with facilities approved at Service Level 4 caring for the most severely disabled consumers. Service Level 4 is subdivided into Levels 4A through 4I, with increasing staffing and professional consultant requirements that correspond to the escalating severity of the consumers' disabilities. (Cal. Code Regs., tit. 17, § 56004, subd. (c).) The rates paid to the facilities by the regional centers are commensurate with the facilities' service levels. A regional center determines the appropriate service level for a facility using the Alternative Residential Model (ARM), a scale used to determine the rate at which the facility is to be compensated for providing appropriate care, given the consumer's particular disabilities and needs.

5. In 2002 and 2004, Service Agency provided "rate letters" to the Department of Children's and Family Services (DCFS), assessing Claimant's level of care needs, for purposes of assisting in the determination of the appropriate amount of benefits under the AAP. Service Agency now disputes that it is required to provide rate letters at all; it is currently engaged in a Superior Court lawsuit, *Edward F. vs. Harbor Regional Center, et al* which should determine whether Service Agency is required to provide them. However, as part of that lawsuit, Service Agency entered into an agreement (the December 15 agreement) which provides that, for the period December 15, 2005 through March 31, 2006, Service Agency would continue to provide rate letters. The pertinent portion of the agreement reads as follows:

> [T]he Regional Center Defendants agree to provide 'ARM rate letters' to DCFS from [December 15, 2005] until March 31, 2005[sic 2006]. Such letters will be issued within a reasonable period from the time that a written request is received from DCFS, or from an authorized representative for the consumer/adoptive parent(s), if such a letter from an authorized representative is deemed acceptable by the Regional Center. Regional Center Defendants' 'ARM rate letters' to DCFS will included a facility service level and corresponding ARM rate.

6. In 2002, Service Agency issued a rate letter to DCFS on Respondent's behalf. His rating was 4I, based on "severe emotional disturbance."[3] This rate was determined by a team of eight to 10 professionals, including a doctor, a psychologist, a nurse, a staff counselor, a program manager, and other Service Agency staff. This group, whose membership could and would change, depending on the circumstances of each individual case, was known as the Living Options Committee. The committee would meet, and each committee member would have input, based on their direct knowledge of the individual being rated, as well as their review of reports, test data, and any other information deemed relevant. The rating was

[2] The regulations governing facility service levels are found at California Code of Regulations, title 17, section 56001 et seq.

[3] The rate letter actually specifies a dollar figure, but equates to level 4I

a consensus of the group. On January 27, 2004, Service Agency again issued Claimant a rating of 4I.

7. In early 2006, DCFS requested Service Agency to issue another rate letter on Claimant's behalf. This request came during the period covered by the December 15 agreement. On January 31, 2006, Service Agency issued a rate letter specifying that Claimant was rated at Level 2.

8. Service Agency's change of rating for Claimant was not the result of a review by the Living Options Committee. Service Agency had no new information upon which to change the rating. In fact, the evidence at hearing conclusively demonstrated that Claimant's rating should not have changed at all. The rate change was made by Service Agency's Executive Director, Patricia Del Monico, after her personal review of Claimant's file, and without the input of anyone else. Ms. Del Monico developed a "framework" by which she would determine the rates. Ms. Del Monico's framework limited ratings to levels 1, 2 and 3. If, for example, a child had mild mental retardation, but had no other problems, he would be rated level 1. If a child was severely handicapped, wheelchair bound or had severe behavioral issues, he would be rated at level 3. All others were rated at level 2. This framework automatically excluded any level 4 ratings, regardless of need. It did not matter to Ms. Del Monico whether the individual being rated was a quadriplegic wheelchair-bound child who could not feed, bathe or clean himself; nor did it matter whether the child was suicidal, violent or delusional. No child would ever get a 4 rating. Ms. Del Monico's rationale for excluding level 4 ratings was that such children should be in a staffed facility, not a foster home, and therefore level 4 ratings simply "did not apply."

9. Of the 45 requests for rate letters Service Agency received during the period covered by the December 15 agreement, Ms. Del Monico automatically excluded 15 from consideration because the children "were underage and not yet eligible." Of the remaining 30 rate requests, two children were rated at level 1, approximately 11 children were rated at level 2 and approximately 17 children were rated at level 3. Although Ms. Del Monico testified that she thoroughly reviewed every child's file, it was apparent she did not do so in Claimant's case. Ms. Del Monico had absolutely no recollection of reviewing Claimant's file, even after being given an opportunity to review it at the hearing of this matter. Additionally, had she "thoroughly reviewed the file," she would have noted Claimant's severe emotional issues, issues which had led the Living Options Committee to twice rate Claimant at lever 4I. Under Ms. Del Monico's "framework," Claimant should have been rated at level 3, a level she would have surely issue had she "thoroughly reviewed the file."

10. The uncontradicted evidence at hearing shows that Claimant should have retained his 4I rating. His severe emotional disturbance, and consequent need for constant supervision, had not abated during the two years between the issuance of the 2004 rate letter and the 2006 rate letter at issue here. In fact, some of his self-injurious behavior increased in severity. Claimant is 15 years old. His size and strength make it difficult to control him physically. He's "like a keg of dynamite," with no ability to judge danger to himself or those around him. He constantly puts others in danger. He will jump out of moving cars and

busses. Within the month preceding the hearing, Claimant jumped out of a moving vehicle while on the freeway. According to one of Claimant's therapists, who testified at the hearing of this matter, Claimant has a "disconnect" between danger and those who try to help him avoid danger. He needs constant adult supervision. He has no social boundaries and is extremely aggressive. If restrained, he will hit, kick and bite; this issue becomes increasingly worrisome as he gets bigger and stronger. He has had homicidal and suicidal ideations. Claimant's conditions, disabilities, deficits and needs have not improved since 2004; they have deteriorated.

12. According to Claimant's parents, DCFS found Service Agency's rate letter, dropping Claimant from level 4I to 2, so perplexing, it felt something was wrong and refused to provide any financial support pending clarification of the rating. Accordingly, Claimant has been denied any aid (he had been receiving in excess of $5,000 per month) since January 2006. According to the parents, their personal funds are now almost depleted, since they have continued to fund services for Claimant in the absence of DCFS funding. Claimant is entitled to a rating of 4I. He has been entitled to that rating, and the concomitant funding, since January 2006. The new rate letter Service Agency will be required to issue in the below Order, will be made retroactive to the date Service Agency's rater letter dropped Claimant's rating from 4I to 2.[4]

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's appeal of the Service Agency's assessment of Claimant's level of care is granted.

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[4] There is an implied covenant of good faith and fair dealing in *every* contract, meaning that neither party will do anything to destroy or injure the rights of the other to receive the benefits of the contract, including a contract which confers discretion on one party over the rights of another. *California Lettuce Growers, Inc. v Union Sugar Company* (1955) 45 Cal.2d 474; *Okun v Morton* (1988) 203 Cal.App.3d 805. The law implies an obligation to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. This rule is applicable to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill, and knowledge. *Roscoe Moss Co. v Jenkins* (1942) 55 Cal.App.2d 369. These obligations extend to Service Agency under the December 15 agreement. Service Agency did not act in good faith in issuing the January 2006 rate letter, a rate letter it was required to issue under the December 15 agreement. Service Agency had no reasonable justification for rating Claimant at level 2. Accordingly, in the event DCFS does not accept the new rate letter to be issued under the below Order, *nunc pro tunc* to the date Service Agency changed Claimant's rating from 4I to 2, Claimant, as an intended 3rd party beneficiary of the December 15 agreement, will have recourse against Service Agency to make up any shortfall in funds he would have received had Service Agency acted in good faith.

2. Service Agency shall forthwith issue a new letter to the Department of Children and Family Services, Adoption Assistance Unit, and/or to Claimant's parents, designating Claimant's service level at Level 4I. Said letter shall specifically state that it is issued in replacement of the rate letter Service Agency issued on January 31, 2006, that the January 31, 2006 rate letter was issued in error, and that the replacement rate letter is intended by Service Agency to be effective as of January 31, 2006.

Date:_____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.